No. 79-1794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHIGAN,

Petitioner,

-VS-

GEORGE SUMMERS,

Respondent.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT

GERALD M. LORENCE
2655 Guardian Building
Detroit, Michigan 48226
(313) 961-9055
Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

QUESTIONS PRESENTED

The Respondent will discuss the following questions:

1. DOES A SEARCH WARRANT FOR DESCRIBED PREMISES, WHICH DOES NOT IDENTIFY SPECIFIC OR DESCRIBED PERSONS WHO MAY BE FOUND THEREIN, WITHOUT MORE, AUTHORIZE OFFICERS EXECUTING THE WARRANT TO SEARCH THE PERSON OF INDIVIDUALS FOUND ON OR ABOUT THE PREMISES?
2. DO POLICE OFFICERS ACTING PURSUANT TO A PREMISES SEARCH WARRANT, WHICH DOES NOT AUTHORIZE SEARCH OR SEIZURE OF SPECIFIC OR DESCRIBED PERSONS, AND ABSENT SPECIFIC ARTICULABLE FACTS LINKING A PERSON OCCUPYING THE PREMISES TO CRIMINAL ACTIVITY, HAVE THE RIGHT TO DETAIN AN OCCUPANT FOUND LEAVING THE PREMISES AT THE TIME OF THEIR ARRIVAL?
3. WHERE THE CONDUCT OF THE OFFICERS VIOLATED THE FOURTH AMENDMENT RIGHTS OF THE DEFENDANT AND CONSTITUTED A SERIOUS DEPARTURE FROM THE FOURTH AMENDMENT WARRANT REQUIREMENTS, WAS THE APPLICATION OF THE EXCLUSIONARY RULE TO SUPPRESS EVIDENCE FOUND AS A RESULT OF THAT CONDUCT PROPER?

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 68 Mich App 571; 243 NW 2d 689 (1976). The opinion of the Michigan Supreme Court is reported at 407 Mich 432; 286 NW 2d 226 (1979). Rehearing was denied on February 29, 1980.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 26, 1976. The judgment of the Michigan Supreme Court was entered on December 27, 1979 (re-

hearing denied on February 29, 1980). The jurisdiction of this Court is invoked under 28 USC sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 10, 1974, Police Officers of the Detroit, Michigan Police Department obtained a search warrant to search premises known as 9356 Mansfield, Detroit, Michigan, said Warrant was to search for "1. Heroin, 2. Any other narcotic materials and paraphernalia" (J.A. 60).

While the Affidavit in Support of the Warrant had alleged purchase of bulk heroin from a person described as

"George" (J.A. 60) on the previous day, no person or persons were named in the Warrant.

Upon approaching the premises, the officers saw Defendant Summers exiting the premises.[1] (J.A. 6)

The officer asked Defendant if he lived there and he replied that he did. (J.A. 6). The police officer asked the Defendant if he could let them in and Defendant said he could not because he had left his keys inside, but he would rink and ask those inside to open it up. (J.A. 6). The Defendant rang the front door buzzer.

A man later identified as Dwight Calhoun opened the inner door (J.A. 7). Officer Conant identified himself and tried to open the storm door. It was locked. (J.A. 7). Dwight Calhoun slammed the inner door. (J.A. 7). Theree officers using a battering ram broke down the door (J.A. 7), and went inside. At the request of Officer Lehman, Officer Conant took Defendant into the house (J.A. 29) and remained with Defendant while the house was searched (J.A. 29). Narcotics were found in the basement (J.A. 23-24). Upon returning upstairs and finding Defendant to be the alleged owner, the Defendant was searched (J.A. 24-25), heroin was found on his person (J.A. 25) and George Summers was arrested. (J.A. 30). He was charged with possession of the heroin found on his person.

Defendant was bound over for trial following a Preliminary Examination. A Motion to Suppress Evidence and Quash the Information was granted and affirmed by the Michigan Court of Appeals, *People v. Summrs,* 68 Mich. App. 571, 243 N.W. 2d 689 (1976) and the Michigan

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[1]There is no indication from the record that Defendant was or resembled the "George" described in the Affidavit in Support of the Warrant.

Supreme Court, *People v. Summers,* 407 Mich. 432, 286 N.W. 2d 226 (1979) and the People petitioned and obtained a Writ of Certiorari from this Honorable Court.

SUMMARY OF ARGUMENT

The warrant requirement of the Fourth Amendment is rooted not in the concept that the owner of property is suspected of crime, but that the specific things to be searched for and seized are on the property to which entry is sought. *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978). The Fourth Amendment protection against unreasonable searches and seizures is a personal right, protective of legitimate expectations of privacy of persons, not places, *Ybarra v. Illinois,* 444 U.S. 85 (1979); *Katz v. United States,* 389 U.S. 347 (1967).

While a search warrant, which is a judicial rather than ministerial decision, may issue for specific or described persons upon a showing to the issuing court that probable cause exists that named or described persons may possess the things to be searched for and seized, the issuance of a premises search warrant, without more, does not provide authority to search persons found on or about the premises when the officer arrives, *Ybarra v. Illinois,* 444 U.S. 85 (1979); *Sibron v. New York,* 392 U.S. 40 (1968)

The existence of a premises search warrant does not, without more, give officers authority to detain an individual found leaving the premises by the arriving officers, for such detention violates the personal Fourth Amendment rights of the person detained; there must be specifically articulable facts, known to the officer at the time of his action, leading him to believe the person is associated with criminal activity, before detention beyond the addressing of questions may be

permitted. *Dunaway v. New York,* 442 U.S. 200 (1979); *Terry v. Ohio,* 392 U.S. 1 (1968). The mere propinquity to individuals independently suspected of crime does not give probable cause to search a person, *Sibron v. New York,* 392 U.S. 40 (1968).

In the case at bar, the officers, upon their arrival, had no specifically articulable facts linking Defendant to criminal activity, or reason to believe him armed or dangerous, justifying his detention.

The conduct of the officers was in violation of both the Defendant's Fourth Amendment rights and violative of the general principles and historical roots of the Fourth Amendment, under apparent or alleged color of a court order. This was an improper police practice, and abused the integrity of the Court who issued the premises search warrant. As such, the application of the exclusionary rule to the heroin seized from Defendant was proper.

I.

THE ISSUANCE OF A PREMISES SEARCH WARRANT DOES NOT, WITHOUT MORE, CONSTITUTIONALLY PERMIT A SEARCH OF PERSONS FOUND ON THE PREMISES DESCRIBED IN THE WARRANT.

INTRODUCTION: FOURTH AMENDMENT PARAMETERS

The most common form of search warrant issued by courts, especially in urban areas, is the premises search warrant for narcotics, *See* T. Taylor, *Two Studies in*

Constitutional Interpretation, 48 and Note 85 (1969) cited in *Zurcher v. Stanford Daily,* 436 U.S. 547, 548-49 (1978) (Dissent of Justice Stevens). It is in the execution of such warrants that citizens and law enforcement officers are most likely to come into contact in the context of warrant procedure. It is, therefore, particularly important that the parameters of the Fourth Amendment, as applied to persons and premises by this Court be set forth with some specificity before discussing the issues presented by Petitioner.

The Fourth Amendment arose as a colonial response to English practice, particularly in enforcement of trade laws, of allowing general warrants, such as writs of assistance, which allowed law enforcement officers to search any ship or home, break down doors, and seize goods at will. Such acts were in derogation of English common law, which required a detailed list of the place to be searched and the things or persons to be seized.[2] Blackstone gave the rationale for this:

> A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its certainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not.

It is from this background of our history that the Fourth Amendment is derived.[3] The Amendment provides:

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[2]R.L. Perry (ED), *Sources of Our Liberties,* 304 (Rev. Ed. 1978)

[3]*Commentaries on the Laws of England,* (9th Ed London 1783), IV 291 quoted in Perry, note 1 *supra* at 304; *See also Payton v. New York* 445 U.S. 573 (1980) (Dissent of Justice Blockman.)

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fourth Amendment has been held by this Court to be protective of the "legislative expectations of privacy" of persons, not places.[4] *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979); *Rakas v. Illinois,* 439 U.S. 128 (1978); *Katz v. United States,* 389 U.S. 347, 351-352 (1967). This is a personal right of the individual.

The warrant provision relates, not to persons, but to property; a warrant may be obtained for a search of specified property without a showing that the owner thereof is necessarily suspected of criminal activity; *Zurcher v. Stanford Daily,* 436 U.S. 547, 556-559 (1978). The probable cause for a warrant to issue is not the probable cause for an arrest, *Zurcher, supra* at 556-557, n.6. There, this Court, speaking through Justice White noted:

> *The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.* The same view has been expressed by those who have given close attention to the Fourth Amendment. "It does not follow, however, that probable cause for arrest would justify the issuance of a search warrant, or, on the other hand, that probable cause for a search warrant would necessarily justify an arrest. Each requires probabilities

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[4]*Perry, supra,* noted at 304-305, 427.

as to somewhat different facts and circumstances, a point which is seldom made explicit in the appellate cases. . .

"This means, for one thing, that while probable cause for arrest requires information justifying a reasonable belief that a crime has been committed and that a particular person committed it, a search warrant may be issued on a complaint which does not identify any particular person as the likely offender. Because the complaint for a search warrant is not 'filed as the basis of a criminal prosecution', it need not identify the person in charge of the premises or name the person in possession of any other person as the offender." LaFave, *Search and Seizure:* "The Court of True Law. . .Has Not. . .Run Smooth", U. Ill. Law Forum 255, 260-261 (1966) (footnotes omitted). "Furthermore, a warrant may issue to search the premises of anyone without any showing that the occupant is guilty of any offense whatever." T. Taylor, *Two Studies in Constitutional Interpretation* 48-49 (1969). "Search warrants may be issued only by a neutral and detached judicial officer, upon a showing of probable cause - that is, reasonable grounds to believe - that criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 340, 358 (1974) (footnotes omitted).

"Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence; that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. By comparison, the right of arrest arises only when a crime is committed or attempted in the presence of the arresting officer or when the officer has 'reasonable grounds to believe' - sometimes stated 'probable cause to believe' - that a felony has been committed by the person to be arrested.

> Although it would appear that the conclusions which justify either arrest or the issuance of a search warrant mut be supported by evidence of the same degree of probity, it is clear that the conclusions themselves are not identical.
>
> "In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location." *Comment,* 28 U. Chi. L. Rev. 664, (1961) (footnotes omitted) (emphasis added).

The specificity requirement is that the warrant described with particularity the individuals or places to be searched and the individuals or things to be seized and is stressed in *Zurcher v. Stanford Daily,* 436 U.S. at 558-559, 564-565 (1978). This Court has held that the specificity required is to, at best, leave nothing to the discretion of the officer with regard to what is to be seized. *Marron v. United States,* 275 U.S. 192 (1927).

With these parameters set forth, one can examine the decisions of this court regarding the interaction of a search warrant for premises and the search of an individual not named therein.

THE INDIVIDUAL IN THE SEARCH WARRANT CONTEXT

This court has succinctly set forth the relationship of an individual to premises that are named in a lawfully obtained search warrant that does not name or describe that person. In *Ybarra v. Illinois,* 444 U.S. 85, 91-92 (1979) this court speaking through Justice Stewart, held:

> Each patron who walked in the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional pro-

tection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg". Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg", it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.*

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*The Fourth Amendment directs that "no Warrants shall issue, but upon probable cause... and particularly describing the place to be searched, and the persons or things to be seized." Thus, "open-ended" or "general" warrants are constitutionally prohibited. *See Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 311 (1978); *United States v. Chadwick,* 433 U.S. 1, 7-8 (1977); *Stanford v. Texas,* 379 U.S. 476, 480-482 (1965). It follows that a warrant to search a place cannot normally be construed to authorize a search of each individual in that place. The warrant for the Aurora Tap Tavern provided no basis for departing from this general rule. Consequently, we need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs.

The *Ybarra* case, like the case at bar, involved a premises search for narcotics. The *Ybarra* court noted that mere propinquity to others independently suspected of criminal activity does not give rise to probable cause to search that person. *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979), *citing Sibron v. New York,* 392 U.S. 40, 62-63 (1968).

Many of the cases cited by the petitioner are not in-

consistent with the analysis required by *Zurcher, supra,* and *Ybarra, supra.* Where the search is of personal property of one not an owner, found on the described premises,[5] the search is permissible under *Zurcher, supra.* The search is not moving to invade the personal right of anyone.

Nor is a search of a person named or described in a warrant a conflict with these principles; for such warrants can issue upon a showing of probable cause that the things sought will be found on his person.[6]

The petitioner would assert, in effect, that a person on premises subject to a warrant is, in the narcotics context at least, a "container" where the contraband may be hidden. This argument misses the distinction between *Zurcher* and *Ybarra,* between things and persons, between individual rights, which are to be jealously guarded, and the warrant requirement, with its standard of probable cause. To adopt the position asserted by petitioner is to permit, contrary to *Sibron, supra,* a search based upon mere propinquity, of the person, and in effect makes the premises search warrant in a narcotics case a general warrant, contrary to the historical basis of the Fourth Amendment. This position, asserted by petition (Brief at 22) to distinguish the case at bar from *Ybarra* cannot hold.

The other distinction made by petitioner between the instant case and *Ybarra v. Illinois,* 444 U.S. 85 (1979) is

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[5]Of the cases cited by petitioner, these include *United States v. Johnson,* 475 F.2d 977 (DC Cir. 1973); *United States v. Mitchell,* 487 F.2d 429 (1st Cir. 1973); *State v. Kurtz,* 612 P.2d 749 (Or. App. 1980; *Commonwealth v. Snow,* 298 N.W. 2d 804 (Mass. 1973); *Commonwealth v. Smith,* 348 N.E. 2d 101 (Mass. 1976).

[6]It should be noted that the investigating officers had a description of the person who sold the narcotics to the informant, but there is no indication they even tried to get a warrant to search this person.

that *Ybarra* involved a public place, a bar, and the instant case involved a residence. Again, this argument misses the distinction, made clear in *Ybarra, supra,* and *Zurcher, supra,* between individual rights and the warrant requirement, dealing with things and places.

If the investigators have probable cause to believe that persons occupying described premises are, individually or in concert, likely to have on their person contraband allegedly to be found on the premises, a warrant can issue for the search of that person, as well as the premises, without violation of individual rights or the warrant requirement, to make any person on the premises a potential "container" is to do both; it intrudes upon the individual without a nexus being established between the person and the suspected contraband other than mere presence, *United States v. Di Re,* favorably cited, 332 U.S. 581, 583-587 (1947); *Ybarra v. Illinois,* 444 U.S. 85, 94-95 (1979), and destroys the concept of limited intrusion, as opposed to general warrants, that is at the heart of the Fourth Amendment warrant requirement.

II.

THE MERE EXISTENCE OF A PREMISES SEARCH WARRANT DOES NOT, WITHOUT MORE, JUSTIFY THE DETENTION OF RESPONDENT BY THE OFFICERS.

Police officers appeared at a home where Defendant lived with a premises search warrant authorizing a search of the premises, but not of any named or described person. They encountered defendant walking away from the home. He said he lived there, but did not have his key with him. He

knocked, and a man answered the door; then slammed it. The officers detained defendant, forcibly brought the defendant into the premises, searched the house, found alleged contraband, arrested defendant, then searched his person, and found narcotics, for the possession of which he was charged.

Defendant submits that his detention and the seizure of the heroin from his person were in violation of his Fourth Amendment protection from unreasonable search and seizure.

Like the issue preceding, defendant respondent submits there are several settled constitutional principles which must be set forth before analysis of the position taken by the petitioner.

The Fourth Amendment applies to legitimate "expectations of privacy" of persons, not places. *Ybarra v. Illinois,* 444 U.S. 85, (1979); *Rakas v. Illinois,* 439 U.S. 128, 138-143 (1978); *Katz v. United States,* 389 U.S. 347, 351-352 (1967).

The warrant requirement deals with things and places, and is governed by a probable cause requirement not necessarily linked to the probable cause to arrest a person, *Zurcher v. Stanford Daily,* 436 U.S. 547, 557-559 (1978).

A police officer, acting upon reliable information, may make a reasonable investigatory stop, without having probable cause to arrest, to investigate possible criminal behavior, *Adams v. Williams,* 407 U.S. 143, 145-147 (1972); *Terry v. Ohio,* 392 U.S. 1 (1968). If the officer is justified in believing himself in danger, he may conduct a pat down search for weapons. *Id.* This is a narrow exception to the probable cause requirement and is to be construed narrowly, *Ybarra v. Illinois,* 444 U.S. 85 (1979), *Dunaway v. New York,* 442 U.S. 200 (1979).

While *Terry, supra,* specifically did not deal with an investigative seizure for "detention", the *Dunaway* majority

noted the following from Justice White's *Terry* opinion:

> 12. Terry specifically declined to address "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation". *Id.*, at 19 n. 16. Mr. Justice White, in a concurring opinion, made these observations on the matter of interrogation during an investigative stop:
>
> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id.*, at 34.

442 U.S. at 210, n. 12.

In the case at bar, it is submitted that Defendant Summers was "detained" by the officers from the time they learned he was an occupant of the premises. Summers was never advised that he was free to go and was in fact brought into the premises and held in the company of the officers while the premises, suspected of containing contraband, and which had been forced open, was searched, and contraband was found. The situation presented was one where a reasonable individual, given the circumstances and the show of police authority, would have believed he was not free to leave, and, accordingly, defendant was "seized". *United States v. Mendenhall,* ____ U.S. ____ 48 U.S.L.W. 4575 (May, 1980), (opinion of Justice Stewart). This was no different than a traditional arrest and appears as an act seeking to

justify the arrest by the fruits of the search. The answer given prior to search may justify further observation of defendant, but not arrest and detention.

The Fourth Amendment protection is a strong one, designed by the founders to be rigidly applied, and any deviation therefrom must be narrowly construed. In *Dunaway v. New York,* 442 U.S. 200 (1979), this court held:

> In effect, respondent urges us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideratio and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

This court also reiterated its position taken in *Davis v. Mississippi,* 394 U.S. 721 (1969) and *Brown v. Illinois,* 422 U.S. 590 (1975) that Fourth Amendment rights apply at the "investigative stage"; that it is not the form of the police conduct or its label, but the impact upon the citizen,

that triggers the application of the amendment. In the case at bar, the impact of the police conduct upon defendant was no different than a traditional arrest. That it is at an "investigatory" level - at a warrant search for things in a described place - does not change the impact. The *Davis* court held:

> [T]o argue that the Fourth Amendment does not apply to the investigatory state is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizentry, whether these intrusions be termed 'arrest' or 'investigatory detentions'. 394 U.S. at 726-727.

It is into this context that one must analyze the cases and arguments of the petitioner.

The "border search" cases cited by petitioner are most readily distinguishable, *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976). The border area traditionally permits a less restrained search practice for illegal activity related to the border and the Fourth Amendment proportion is reached only when search practices are highly intrusive, *United States v. Ramsey,* 431 U.S. 606, 616-619 (1977).

Pennsylvania v. Mimms, 434 U.S. 106 (1977), involved a lawful traffic stop, where the officer had a right, by his observation of defendant's operation of the car, to detain him. Under these circumstances the further intrusion of ordering defendant from the car was "incremental". 434 U.S. at 109 and de minimus 434 U.S. at 121. This intrusion is the sole basis of the decision, and is a far cry from the case at bar.

Delaware v. Prouse, 440 U.S. 648 (1979) found unconstitutional a law enforcement practice allowing random stops of vehicles to check license registration and held that there must at least be an articulable and reasonable basis that either the vehicle is not registered or the driver is unlicensed to justify such stops. Stopping all cars, at a checkpoint, would, for example, be allowed, but if discretion is to be allowed the officers, it must be based on an individualized set of facts. 440 U.S. at 663.

At the time of the intrusion and detention of defendant in the case at bar, the officers had no such articulable facts. They had a warrant for premises, to search for contraband, but did not articulate, so as to be included in the warrant, probable cause that any named or described person, had the contraband. There is no evidence from the fact of the issuance of the warrant to suggest guilt of a described or named person, *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978). The questioning by the officers of Summers, allowable under *Terry v. Ohio,* 392 U.S. 1 (1968) prior to the appearance of the man inside, did not create probable cause to arrest, and there was no pat down search or articulable facts to permit one. When the man inside came to the door, there was no showing of concerted action between him and Summers to individualize probable cause to defendant to justify his detention or a search of his person. The forcing of the door, done *after* the detention revealed contraband in the basement. It was only *after,* and as a result of, the detention that any articulable facts could be said to have surfaced to link defendant to anything found on the premises and it was only as a result of this alleged linkage that intrusion into his person could be justified.

At the time of detention there were no articulable facts known to the officers to link defendant to any contraband

they might find in the premises. The detention of defendant was, by its conduct, in the nature of a traditional arrest, and notthe slight intrusion of *Terry v. Ohio,* 392 U.S. 1 (1969), or *Pennsylvania v. Mimms,* 434 U.S. 106 (1977) or the traditionally unique border cases.

There was a violation of the Fourth Amendment right of defendant by the actions of the officers, correctly found by the Michigan courts.

III.

THE EXCLUSIONARY RULE WAS PROPERLY APPLIED IN THE CASE AT BAR, GIVEN THE FUNDAMENTAL FOURTH AMENDMENT PRINCIPLES INVOLVED

The petitioner and the Solicitor General of the United States, as Amicus Curiae, argue that the exclusionary rule should not apply to preclude use of the evidence seized from Defendant-Respondent's person, if, as Defendant-Respondent submits and the Michigan Supreme Court found, the seizure violated the Fourth Amendment. Heavy reliance is placed upon *United States v. Williams,* 622 F.2d 830, 840-849 (5th Cir. 1980), petition for certiorari filed September 2, 1980, where the Fifth Circuit, *en banc,* held that henceforth, the exclusionary rule would not be applied where the evidence is discovered by officers acting in good faith and in the reasonable, though mistaken belief, that their conduct is authorized.

Respondent would submit that this reliance is misplaced; the majority opinion in *Williams* specifically limits itself to *warrantless* actions and specifically excludes comment on factual situations where a warrant has been obtained,

Williams, supra at 840. As will be shown herein, there are valid reasons for this distinction, given the Fourth Amendment principles involved.

Likewise Petitioner and the Solicitor General rely upon *Michigan v. Tucker,* 417 U.S. 433 (1974), where this court refused to exclude evidence obtained prior to, and in a manner inconsistent with, the decision of this Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), clarifying the constitutional protection against self-incrimination. *Tucker* relied upon a comparative analysis of the historical premises upon which the Fifth Amendment was based and the conduct involved, and a conclusion that privilege against self-incrimination had not been violated, only that the Defendant did not receive the full procedural safeguards required to protect the right. 417 U.S. at 443-446. Respondent submits that the Fourth Amendment rights involved in the case at bar differ significantly from that presented in *Tucker* and the historical tradition from which they arise call for application of the exclusionary rule.

In *Payton v. New York,* 445 U.S. 573 (1980), this court held that the Fourth Amendment required a warrant be obtained to facilitate an arrest in the home. This was notwithstanding the fact that a majority of states permitted such warrantless entry. The Court noted that, in the past decade, the number of such states permitting such conduct was on the decline. *Payton, supra,* at 659, and that those states dealing with the question had, for the most part, either found such activity unconstitutional or, at least, that serious constitutional questions were presented. The Court found that an arrest warrant naming a person impliedly carries with it limited authority to enter a dwelling where he lives or there is reason to believe he was within and absent such a warrant the convictions were set aside.

It is submitted that, while Michigan or the Sixth Circuit had not dealt with the specific issue herein presented, the trend in this analogous area should have been known and considered by the courts issuing warrants in Michigan.

It has been recognized in Michigan that the issuance of a warrant is not a ministerial act on the part of the magistrate, but involves the exercise of judicial discretion and the magistrate must satisfy himself that reasonable or probable cause exists for the requested warrant before signing it. *People v. Kramer,* 225 Mich. 35, 195 N.W. 802 (1923); *People v. De La Mater,* 213 Mich. 167, 182 N.W. 57 (1921). The description of the scope of the warrant was, in Michigan, viewed as a limited one. *See*, i.e., *People v. Bawiec,* 228 Mich. 32, 199 N.W. 702 (1924).

The roots of the Fourth Amendment, while less clear to the majority in *Payton, supra,* as perhaps the rules on arrest in public places, were found by the majority to be based on the common law requirement of a warrant or substantial exigent circumstances to arrest a suspect at home. 445 U.S. 573 (1980) (Dissent of Justice Blackmun). It was abuse of the warrant process by the Crown that was the impetus for the Fourth Amendment. *Id.*

These cases demonstrate the need for the distinction made in *Williams, supra.* In a situation involving a warrant, the police officers of necessity are seeking a prior approval of their proposed conduct by the judiciary, which must apply its discretion and apply the appropriate constitutional guidelines to the proposed conduct. The warrant in effect is a determination of the authority of the officers given them by the information in their possession. Officers acting without a warrant do not have the benefit of, or the actual knowledge of, those constraints (hopefully) conveyed to them by the judiciary. In executing a warrant, the officers carry with

them the integrity of that judicial discretion. If it is abused, it is the court, as well as the public, who suffers. Unlike *Tucker,* where the failure was not to protect a fundamental right, but a failure of the officers to provide full procedural safeguards, subsequently articulated by this court, the case at bar presents a situation involving the scope of the Fourth Amendment, as applied to an individual and to premises, and seeks an interpretation in serious conflict with the historical basis and roots of the Amendment. It is a direct consequence of actions of officers executing a court order, seeking direct evidence of crime.

This distinguishes several cases cited by Petitioner where the conduct is either not done by government agents, *Burdeau v. McDowell,* 256 U.S. 465 (1920) or not sought to be used to obtain direct evidence of crime against the accused, *Harris v. New York,* 401 U.S. 222 (1971); *Walder v. United States,* 347 U.S. 62 (1954). *See also United States v. Payner,* ____ U.S. ____ , 48 U.S.L.W. 4829 (1980), (accused lacks standing to seek exclusion of evidence obtained in violation of another's constitutional rights). The case at bar is clear; the accused is asserting claim of personal Fourth Amendment rights and challenging the scope of a warrant directed to premises occupied by him under the Fourth Amendment.

It is also with some interest to note that the Petitioner seeks a limitation of the exclusionary rule for the case at bar based largely upon the narrow authority of *Michigan v. Tucker,* 417 U.S. 433 (1974) and the United States, as *Amicus Curiae,* on the ground that the conduct occurred before the decisions in *Dunaway v. New York,* 442 U.S. 200 (1979) and *Brown v. Illinois,* 422 U.S. 590 (1975). Respondent has demonstrated that the historical context of the Fourth Amendment and the nature of the conduct involved, a form of analysis approved by this court in

Michigan v. Tucker, 417 U.S. 433 (1974) prior the conduct complained of, justifies the conclusion made by the Michigan court.

It should also be pointed out that, at the time of the conduct complained of, courts and law enforcement agencies were aware of the strong criticism, and strong warning, of Justice Burger, dissenting in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), that the exclusionary rule may be a poor tool to deter law enforcement officers from using unlawful means to obtain evidence, and that means, other than the judicial, are needed to provide a better form of deterrence. Rejection of the rule is not a license to expand permissible conduct, it is seen as a change in analysis, and remedy, possibly beyond the power of the Court. This analysis is particularly true in the warrant context, with police acting upon instruction sought and approved by the issuing court.

Absent this alternative analysis, which Petitioner does not present, and for the reasons stated herein, Respondent submits that the application of the exclusionary rule was proper in the case herein.

CONCLUSION

WHEREFORE, Respondent George Summers concludes that this court should affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

/s/ GERALD M. LORENCE
Attorney for Respondent